

BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

October 29, 2001

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

VIA HAND DELIVERY

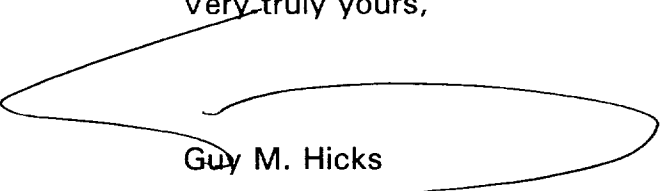
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Determine the Compliance of BellSouth
Telecommunications, Inc.'s Operations Support Systems with State
and Federal Regulations*
Docket No. 01-00362

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to the Motion of AT&T and SECCA for Summary Finding. Copies of the enclosed are being provided to counsel of record.

Very truly yours,


Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

Docket No. 01-00362

**RESPONSE OF BELL SOUTH TO MOTION OF AT&T
AND SECCA FOR SUMMARY FINDING**

BellSouth Telecommunications, Inc. ("BellSouth") hereby objects to the Motion for Summary Finding of AT&T and SECCA (collectively "AT&T") and states as follows:

I. No Additional Discovery Is Necessary For AT&T To Present Its Case.

In its Phase I filing in this proceeding, BellSouth has provided the Authority with a vast amount of information upon which the Authority can rely to assess both the nondiscriminatory access BellSouth provides to its OSS, and the regionality of BellSouth's OSS. BellSouth's *prima facie* case consists of several different parts: (1) commercial usage of BellSouth's OSS (which the FCC has deemed to be the most probative evidence of checklist compliance); (2) BellSouth witness testimony describing the regional nature of BellSouth's OSS; (3) a third party attestation of the regionality of BellSouth's preordering and ordering systems; and (4) the Georgia Third Party Test ("TPT"). Each piece of evidence verifies that BellSouth is meeting its obligations with respect to access to its OSS.

In its Motion, AT&T asks the Authority to disregard all of the evidence before it and instead enter a summary judgment that BellSouth's OSS are not reliable. This request is ludicrous. Although the CLECs are trying to magnify the importance of the Georgia TPT, it is crucial to remember that the FCC has repeatedly found that actual commercial usage is the most probative evidence of compliance with the Act. Thus, while the Authority can, and certainly should, rely on the Georgia TPT for those areas for which there is insufficient commercial usage, actual data should always be considered first. As the performance data BellSouth has filed with the Authority shows, there is extensive commercial usage of BellSouth's OSS in both Tennessee and Georgia upon which the Authority can rely to assess BellSouth's compliance with the Act. Moreover, the performance data demonstrates that BellSouth is providing nondiscriminatory access to its OSS. The Authority, therefore, can conclude that BellSouth's OSS is reliable based on actual commercial usage and need only consult the TPT in limited, if any, circumstances. Entering some sort of dispositive motion at this stage of the proceeding would mean that the Authority ignored what the FCC has deemed to be the most probative evidence of compliance with the Act.

Granting the Motion also would mean that the Authority ignored the vast amount of information about the Georgia TPT that AT&T and this Authority already have. First, there is an enormous amount of information about the test that is publicly available to AT&T and the Authority. Specifically, the Master Test Plan and the Supplemental Test Plan each were hundreds of pages long, and the KPMG

Final Test Report was over 2,000 pages. In addition, all of the KPMG exceptions issued to BellSouth during the test, as well as BellSouth's responses thereto, are public.¹

Second, AT&T was afforded substantial discovery in the Georgia proceeding, all of which BellSouth will stipulate into this proceeding. KPMG provided AT&T 10 boxes of documents in response to discovery requests in Georgia, and two full days of depositions of KPMG personnel. In addition, the Georgia Commission conducted a full day hearing on the TPT for which there is a transcript and in which AT&T participated.²

AT&T also conducted an enormous amount of discovery into the TPT in conjunction with the North Carolina 271 proceeding. AT&T served BellSouth with over 160 data requests and approximately 65 requests for production of documents, many of which related directly to the TPT. In addition, AT&T deposed 16 BellSouth employees, including the BellSouth employee most knowledgeable about the TPT, Milton McElroy, who will testify in this proceeding. AT&T also served written discovery on non-parties KPMG, PriceWaterhouseCoopers and Hewlett Packard. AT&T took the deposition of 6 KPMG employees/consultants, and KPMG agreed to bring two additional employees to testify in the North Carolina

¹ Indeed, KPMG exceptions and BellSouth's responses thereto were filed with the Authority and served on the parties in OSS Docket No. 99-00347 until this proceeding was convened.

² Notably, the GPSC told the parties at the outset of the TPT hearing that the Commission would go as late into the evening as the parties wanted to ensure that the parties had a full opportunity to question KPMG about the test. At 4:00 in the afternoon, AT&T announced that it had no further questions.

proceeding. Notably, AT&T declined KPMG's offer and told KPMG it only needed one of those two employees at the hearing.³ AT&T alleges in its motion that the Georgia test report "should not be permitted as evidence in this docket unless KCI and Hewlett Packard are subject to cross-examination on the test and report." (Motion at p. 7) As shown herein, KPMG and Hewlett Packard representatives have been subjected to AT&T cross-examination and the transcripts from those examinations will be available in Tennessee.

In short, AT&T has had ample opportunity to investigate the Georgia TPT and has more than sufficient information to present its case to the Authority. It is relevant that while AT&T is complaining to this Authority that it cannot present its case without additional discovery, AT&T has participated in the 271 hearings in both South Carolina and Kentucky without using (or attempting to use) any of the discovery it took regarding the Georgia TPT in either Georgia or North Carolina. Thus, AT&T's claim that it is somehow hampered in its ability to present its case in this proceeding rings hollow. In reality, all AT&T seeks is delay of BellSouth's entry into the long distance business.

What AT&T is asking the TRA to do is deny BellSouth the opportunity to present its case due to the conduct of independently represented parties over whom BellSouth has no control. As BellSouth told the Authority at the prehearing

³ Pursuant to a letter of October 25, 2001, from counsel for KPMG to counsel for AT&T, KPMG agreed to stipulate to the use of the North Carolina discovery in Tennessee but informed AT&T that pursuant to specific instructions from the Florida Public Service Commission, it will not make its personnel involved in the Florida test available to preserve the integrity of the test.

conference, BellSouth does not represent KPMG or HP, and thus cannot control their actions. That being said, while AT&T has characterized KPMG as "refusing" to cooperate, this characterization is incorrect. KPMG explicitly told AT&T that KPMG Consulting is willing to undertake reasonable efforts to clarify for the TRA any issues of fact regarding the Georgia Final Report. Moreover, BellSouth has told AT&T that BellSouth will work with PWC and EYCG to facilitate cooperation.

AT&T also seeks to hold BellSouth responsible for a directive of the Florida Public Service Commission that KPMG not produce employees involved in the Florida test. The Florida Commission certainly is entitled to protect the integrity of the Florida test as it deems appropriate. The TRA should not hold BellSouth responsible for the FPSC's decision, particularly in light of the questionable relevance of any of the information to this proceeding.

II. Summary Judgment Is Not An Appropriate Disposition Of This Issue.

A summary disposition of this matter is legally unsustainable. BellSouth has filed the information that proves both that it is providing nondiscriminatory access to its OSS, and that its OSS are the same regionwide. Summary judgments are appropriate only when there are no genuine material factual disputes regarding the claim embodied in the motion and when the moving party is entitled to a judgment as a matter of law. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). In summary judgment proceedings, the evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in the nonmoving

party's favor. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Thus, a summary judgment should be granted only when the evidence reasonably supports only one conclusion -- that the moving party is entitled to a judgment as a matter of law. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell*, 900 S.W.2d at 26.

The Tennessee Supreme Court has repeatedly stated that the purpose of a summary judgment proceeding "is not the finding of facts, the resolution of disputed factual issues, or the determination of conflicting inferences reasonably to be drawn from the facts." *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Rather, according to the court, the purpose of summary judgment "is to resolve controlling issues of law, and that alone." *Id.*

Clearly, BellSouth has set forth its *prima facie* case that its OSS are reliable, accessible and regionwide. The CLECs, on the other hand, presented a scant 19 pages of testimony, which does not begin to address or rebut BellSouth's *prima facie* case. The fact that AT&T might not agree with BellSouth's position hardly meets the legal standard for summary judgment.

Moreover, the relief sought by AT&T is unnecessary and punitive. First, there is more than sufficient evidence in the record and publicly available to permit the Authority to assess the reliability of the TPT. Second, the Florida Public Service Commission, not BellSouth, has directed KPMG not to produce those employees involved in the Florida test while the Florida test is ongoing. Third, the Authority has before it an enormous amount of evidence regarding the test itself

that it must consider before rendering any judgment on the reliability of the test. Last, putting the TPT aside, BellSouth has provided the Authority with extensive commercial data in support of its case, all more probative to the Authority's inquiry than the TPT.

Finally, AT&T's claim that it is "the investigator" in this proceeding is misplaced. This proceeding is no different than other contested case proceedings. The party asserting the affirmative of an issue bears the burden of proof. BellSouth agrees that it has the burden of proof to demonstrate non-discriminatory access to its OSS. BellSouth should be allowed to put on its case.

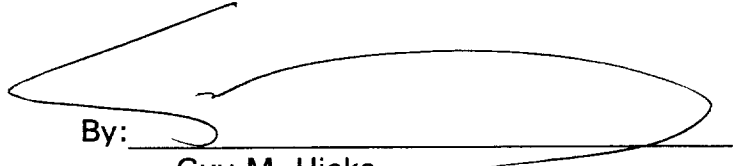
CONCLUSION

The Authority should see AT&T's Motion for what it is – another attempt to thwart BellSouth's entry into the interLATA market. AT&T is attempting to use the discovery process to divert the Authority's attention from the real issues at hand. Bear in mind that while AT&T is complaining to this Authority that it absolutely cannot present its case without yet more discovery, AT&T presented its entire 271 case in both South Carolina and Kentucky without the use of any KPMG discovery. Moreover, the vast majority of the discovery sought by AT&T in this proceeding is discovery into the Florida test that the Florida Commission has deemed to be inappropriate. With respect to the Georgia test, AT&T already has all of the discovery possible about the test. Any claim of lack of information simply is not correct. At the very least, AT&T should be required to specify precisely what information it says it still needs regarding the Georgia test and why.

For these reasons, BellSouth respectfully requests that the Authority deny the Motion.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A large, stylized handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

By:

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

Fred J. McCallum, Jr.
Lisa S. Foshee
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2001, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

James P. Lamoureux
AT&T
1200 Peachtree St., NE, #4068
Atlanta, GA 30367

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

James Wright, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Jon E. Hastings, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, Tennessee 37202

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Terry Monroe
Competitive Telecom Assoc.
1900 M St., NW, #800
Washington, DC 20036

